IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 839 OF 1994

1. Food Corporation of India Employees" Association, West Zone, affiliated to National Executive committee, FCIE Union, New Delhi, having its office at Room No.9, 4th Floor, Mistry Bhavan, D.W. Road, Churchgate, Bombay-400 020)

2. Shri J.J. Halarnekar of Bombay, Indian Inhabitant, presently residing at Sri-Kalimata Co-operative Housing Society, Shiv-Srushti Kurla (East), Bombay-24.)..Petitioners

Versus

1. Food Corporation of India, having its office at 16/20, Barakhamba Lane, New Delhi-110 001.)

2. Senior Regional Manager (Male) Food Corporation of India, having office at 3rd Floor, Mistry Bhavan, D.W. Road, Churchgate, Bombay-20)

3. Zonal Manager (West), Food Corporation of India, having office at 2nd floor, Mistry Bhavan, D.W.Road, Churchgate, Bombay-400 020)..
Respondents

Mr. S.S. Pakale for the petitioners.

Mr. V.G. Mujumdar, instructed by Ms. Rupali Pawar, for respondents.

CORAM: **SWATANTER KUMAR, C.J.** &

S.C. DHARMADHIKARI, J.

Judgment reserved on : April 10, 2007
Judgment delivered on: April 19, 2007

JUDGMENT (Per Swatanter Kumar, C.J.):

1. Shri J.J. Halarnekar, petitioner No.2, joined the services of the first respondent at Bombay in the year 1958. Having rendered satisfactory service for a considerable time, the second petitioner was promoted to the post of AG-II (D) and thereafter AG-I (D). He had put in nearly 35 years of service with a clean and unblemished service record. He was working in the office of the District Manager, Food Corporation of India, Cortalium, Goa. In the month of January, 1986, there was heavy arrival of wheat by upcountry wagons. The wheat bags were kept in open space near the godown. It was an emergency decision as there was no place to store the grains. The wheat bags which were kept in open space were infested with pigs, buffaloes, rats, birds, etc. There was no compound wall. The order for keeping the stocks in the open area was passed by the higher authorities and,

according to the second petitioner, he was only implementing the orders. Day-to-day expense of Rs. 90,000/- to Rs. 1,00,000/- was saved by storing the said material in the open space. The wheat stocks were received by the Corporation under quality complaints. The bags were mixed with damaged grains and black seeds which were rated as Grades “C” and “D”. After lifting of some of the bags, it was found that the wheat was not fit for flour mill consumption and, therefore, refused to accept the said stocks. In July, 1986, the loss of grain statement of wheat in the stocks till June, 1986 was prepared wherein the aforesaid loss in two stacks were also shown. The materials were checked and certificates were issued in the month of July, 1986. Even thereafter, a memorandum dated 12th September, 1986, was issued by the District Manager of the Corporation asking the second petitioner to offer his comments in respect of the high percentage of storage losses noticed in Stack No. 5/01 open and Stack No. 10/01 open. The second petitioner submitted his reply on 18th October, 1986, whereafter he was transferred from Goa to Bombay on 7th April, 1987, in routine transfer. One Mr. Dharmik had submitted his report on the basis of which a charge-sheet was issued to the second petitioner in respect of the losses mentioned in those stack numbers.

This memorandum was served on him on 14th December, 1990, in relation to the shortages which took place in June, 1986. The second petitioner could hardly offer any explanation after the lapse of four and half years because of inordinate delay. However, reply was submitted by him on 21st December, 1990, denying the article of charges. According to the second petitioner, one Mr. M.A. Saraf, AG-II (D) was also working and was responsible for this incident but no action has been taken against him. However, departmental enquiry was commenced on 1st November, 1991. The Enquiry Officer submitted the report on 26th April, 1992, holding that the second petitioner was not guilty of article of charges 1 and 3. However, in relation to charge No.2, he held as under:

> "III. The average weight of issue of stocks to REM on 13/1/86 from 5/01 (OP) was less than the receipt average weight. This may be due to the fact that slack bags might have been issued on that day. The texture of gunny was weak and grains were oozing out which is evident from the fact that the bags issued on 24.1.86 was showing high percentage. In any case the overall issue average weight to REM from stack No. 5/01 (OP) was higher than the receipt average weight. As such recording of fictitious and absurd weight for issue of stocks on 13.1.86 to RFM has not been proved. However, for issue of stocks to RFM on 24.1.86 the avg. issue wt. Of 22 bags was 122.540 kgs. This is beyond imagination. The C.O's statement that on 24.1.86 he issued some loss grain filled in poly. sheet on the acceptance by REM along with 22 bags and passed relevant remarks in the

weighment sheet No. 29835 and hence the average weight per bag was high could not be verified. Since DM, Goa did not furnish the copy of the weighment sheet which was called for on the request of C.O. However, the C.O. Has failed to make necessary remarks to the effect that loose grain was also issued along with 22 bags in other relevant register like daily dairy, godown register etc. proves the negligence on the part of the C.O. Thus he has failed to maintain absolute integrity and devotion to duty/as envisaged in regulation 32 of Food Corporation of India (Staff Regulations), 1971.

III. Under the circumstances the charges framed under Article II stands partially proved."

2. The copy of the enquiry report was given to the second petitioner to which he submitted a reply on 4th May, 1992, being his explanation to the comments of the enquiry officer. The disciplinary authority, second respondent, disagreed with the report of the Enquiry Officer and held that the second petitioner was guilty of the article of charges and vide their letter dated 19th May,1992, directed recovery of the amount from the second petitioner. It will be useful to refer to the relevant part of this order:

"AND WHEREAS on careful consideration of the Inquiry Report, submission on Inquiry Report, evidence on record and also after taking into account all the facts and circumstances of the case and application of his mind, the undersigned does not agree with the findings of the Inquiry Officer that the charges framed against Shri Halarnekar are

not proved or some of them partially proved. A statement of the findings of the undersigned together with brief reasons for disagreement with the findings of the Inquiring Authority on the charges is enclosed as required under Regulation 61 of the FCI (Staff) Regulations, 1971.

NOW THEREFORE, the undersigned, having been satisfied that the charges framed against Shri Halarnekar are established, feels that an extreme penalty of removal from service is not called for in view of his past record. As such having taken lenient view, in exercise of powers conferred on him by Regulation 59 of FCI (Staff) Regulations, 1971, hereby imposes a penalty of recovery of the loss sustained by the Corporation to the extent of Rs. 34,978.00 (Rupees Thirty four thousand Nine hundred seventy eight only) from the said Shri J.J. Halarnekar, Assistant Grade I (Depot).

Sd/- (P.M. Khedkar)
Senior Regional Manager,
Maharashtra."

3. Against this order, the petitioner filed an appeal before the third respondent and vide order dated 1st October,1992, the third respondent confirmed the order passed by second respondent and rejected the appeal, resulting in filing of the present writ petition.

4. The contention raised on behalf of the petitioners is that the impugned order is arbitrary and discriminatory inasmuch as the other person, M.A. Saraf, who was looking after the affairs of the godown and

was equally responsible for the faults which have been attributed, no action has been taken against him, while the petitioner has been punished. The other contention raised is that the disciplinary proceedings have been taken after an inordinate delay and this has caused serious prejudice to the second petitioner. Lastly, the disciplinary authority differed with the findings recorded by the Enquiry Officer and second petitioner was not granted any opportunity to put forward his case in relation to the grounds of disagreement stated by the disciplinary authority which were communicated to him only after passing of the impugned order. Thus, according to the second petitioner, the disciplinary authority and the appellate authority have failed to exercise the power in accordance with law.

5. The facts are hardly in controversy. In the present case the stand taken by the respondents is that action has been taken against Mr. Saraf in accordance with law and he has also been punished. According to them, the order does not suffer from any infirmity of law or of jurisdiction by the competent authority. In fact, the order passed by the appellate authority dated 1st October,1992, has fully dealt with the contentions raised and as such no prejudice has been caused to the

second petitioner.

6. As far as the first ground taken by the second petitioner questioning the correctness of the impugned order on the basis of discrimination and arbitrariness is concerned, the same is without any merit. The respondents have specifically stated that disciplinary action was taken against the erring officers including Mr. Saraf and he was also punished in accordance with law. In the face of this, this argument has to be noticed only to be rejected. As far as the question of delay is concerned, there is no dispute before us that the loss of grain statement was prepared in July, 1986, while the proceedings have been initiated by service of a charge-sheet on the petitioner in December, 1990. There is a delay of four and half years in serving the charge-sheet upon the second petitioner and no reason whatsoever has been given in the counter affidavit to explain the causes for such delay and as to how the department came to know of the irregularities stated and which, upon normal exercise of power and supervision, could not be detected in the year 1986 itself when the inventory was prepared. Normally, delay by itself uncoupled with the element of prejudice may not be sufficient for vitiating departmental proceedings but where there

is an undue and unexplained delay even in commencement of departmental proceedings, it could not be very fair to an employee. He may suffer an apparent prejudice being unable to meet the evidence produced during the departmental enquiry. However, we are not inclined to quash the departmental proceedings on this ground itself. All we wish to notice is that there has been an undue delay in initiation of the departmental proceedings and to some extent it has affected the right of the petitioner.

7. From the above referred extracted portions of the order of the enquiry report as well as the impugned order, it is clear that the disciplinary authority has disagreed with the findings of the enquiry officer. On the basis of this disagreement, the second petitioner has been punished and recovery of Rs. 34,978/- has been ordered to be made from his dues. It is also an undisputed fact before us that the reasons for disagreement by the disciplinary authority were provided for the first time to the petitioner along with the order of punishment. This is patent violation of the principles of natural justice and settled canons of law.

8. The learned counsel appearing for the petitioners has relied upon the judgments of the Supreme Court in the cases of (i) *Punjab National Bank and others* vs. *Kunj Behari Mishra*, [(1998) SCC 84] and (ii) *Yoginath D. Bagde* vs. *State of Maharashtra and others,* [(1999) SCC 739] in support of his contention that the entire departmental proceedings would stand vitiated on this ground. In the case of Punjab National Bank (supra), the Court held as under:-

> " 16. In Karunakar case (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704) the question arose whether after the 42nd Amendment of the Constitution, when the enquiry officer was other than a disciplinary authority, was the delinquent employee entitled to a copy of the enquiry report of the enquiry officer before the disciplinary authority takes decision on the question of guilt of the delinquent. It was sought to be contended that in that case that as the right to show cause against the penalty proposed to be levied had been taken away by the 42nd Amendment, therefore, there was no necessity to give to the delinquent a copy of the enquiry report before the disciplinary authority took the final decision as to whether to impose a penalty or not. Explaining the effect of the 42nd Amendment the Constitution Bench at p.755 observed that : (SCC para 28).
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> "All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence of the charges"
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> The Court explained that the disciplinary proceedings break

into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence,the enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. It is the second right which was taken away by the 42nd Amendment but the right of the charged officer to receive the report of the enquiry officer was an essential part of the first stage itself. This was expressed by the Court in the following words: (SCC p. 754, para 26).

26. The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the enquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to

influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute an additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it."

17. These observations are clearly in tune with the observations in Bimal Kumar Pandit case (AIR 1963 SC 612: (1964) 2 SCR 1: (1963) 1 LLJ 295) quoted earlier and would be applicable at the first stage itself. The aforesaid passages clearly bring out the necessity of the authority which is to finally record an adverse finding to give a hearing to the delinquent officer. If the enquiry officer had given an adverse finding, as per Karunakar case (1993) 4 SCC 727: 1993 SCC (L&S) 1184: (1993) 25 ATC 704) the first stage required an opportunity to be given to the employee to represent to the disciplinary authority, even when an earlier opportunity had been granted to them by the enquiry officer. It will not stand to reason that when the finding in favour of the delinquent officers ism proposed to be overturned by the disciplinary authority then no opportunity should be granted. The first stage of the enquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer

must give him a hearing. When the enquiring officer holds the charges to be proved, then that reports has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the enquiry report is in favour of the delinquent officer but in the disciplinary authority proposes to differ with such conclusions, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority. (**emphasis supplied by us**)

18. Under Regulation 6, the enquiry proceedings can be conducted either by an enquiry officer or by the disciplinary authority itself. When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds anenquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs from the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed. This is required to be done as a part of the first stage of enquiry as explained in Karunakar case (1993) 4 SCC 727: 1993 SCC (L&S)1184: (1993) 25 ATC 704).

> 19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7 (2). As a result thereof,whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer."
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> 20. The aforesaid conclusion which we have arrived at is also in consonance with the underlying principle enunciated by this Court in the case of Institute of Chartered Accountants (1986) 4 SCC 537: (1986) 1 ATC 714). While agreeing with the decision in Ram Kishan case (1995) 6 SCC 157: 1995 SCC (L&S) 1357: (1955) 31 ATC 475) we are of the opinion that the contrary view expressed in S.S. Koshal (1994 Supp (2) SCC 468 : 1994 SCC (L&S) 1019: (1994) 27 ATC 834) and M.C. Saxena (State of Rajasthan vs. M.C. Saxena, (1998) 3 SCC 385 : 1998 SCC (L&S) 875) cases do not lay down the correct law."

9. Applying the above principles to the facts of the present case, the action of the respondents is clearly violative of these principles. The purpose of providing an opportunity to an employee to

offer his comments on the enquiry report is to provide a fair opportunity to him so that the said competent authority can consider the version put forward by the employee and then alone pass an order dropping or inflicting punishment upon the delinquent employee. This protection of law available to the petitioner has been completely denied. The object of such protection has been defeated by the very fact that the reasons recorded by the disciplinary authority for

disagreeing with the report of the Enquiry officer were provided only after the impugned order had been passed. Such illegality or violation of basic fundamental rules of natural justice is incapable of being rectified by an appellate authority. At no point of time, prior to passing of the impugned order of punishment, the petitioner was provided adequate opportunity in terms of the above law. Thus the impugned order is violative of the above enunciated principles as well as the principles of natural justice. Consequently, we allow this petition and quash the impugned orders dated 19th May, 1992 and 1st October,1992. There shall be no order as to costs.

CHIEF JUSTICE

S.C. DHARMADHIKARI, J.